ALD-134 **NOT PRECEDENTAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No.09-4372

JAMES D. SCHNELLER, HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER, BY JAMES D. SCHNELLER, TRUSTEE AD LITEM ESTATE OF MARJORIE SCHNELLER, BY AND THROUGH JAMES D. SCHNELLER, TRUSTEE AD LITEM, MARJORIE ZITOMER, EXECUTRIX OF THE ESTATE OF MARJORIE SCHNELLER, ESTATE OF GEORGE H. SCHNELLER, BY AND THROUGH PERSONAL REPRESENTATIVE JAMES D. SCHNELLER

v.

PROSPECT PARK NURSING AND REHABILITATION CENTER, ITS OWNERS AND EMPLOYEES; MARJORIE ZITOMER; RICHARD SCHNELLER; T. SERGEANT PEPPER, ESQUIRE

James D. Schneller, Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 08-cv-05704)
District Judge: Honorable Lawrence F. Stengel

Submitted by the Clerk for Possible Dismissal for Lack of Jurisdiction
or Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
February 25,2010

Before: SLOVITER, AMBRO and SMITH, Circuit Judges

(Opinion filed: March 8, 2010)

OPINION

PER CURIAM

Appellant James D. Schneller, proceeding pro se, appeals from the District Court's dismissal of his action and denial of his post-judgment motions. For the reasons that follow, we will dismiss in part for lack of jurisdiction and otherwise summarily affirm the judgment of the District Court.

Schneller initiated the underlying civil action in the United States District Court for the Eastern

District of Pennsylvania in 2008.[1] In it, he primarily alleged that defendants committed medical and legal malpractice in rendering negligent services to his parents at the ends of their lives. By opinion and order entered on June26, 2009, the District Court dismissed all of his claims and ordered the case closed. On July 10, Schneller timely filed a motion for reconsideration which was denied on August 6, 2009. On August 11, Schneller filed a motion to "supplement the record," followed by a motion for sanctions and costs on September 1. The District Court denied Schneller's motion to supplement the record on September 4, 2009, and denied his motion for sanctions and costs on September 9, 2009. On October 8, 2009, Schneller filed a six-page document entitled "Plaintiffs' Motion for Leave to Appeal In Forma Pauperis" which detailed the errors allegedly made by the District Court in

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[1] Schneller filed his complaint pro se. In it, he purported to represent other persons and entities. As a pro se litigant, Schneller may not represent parties other than himself. See Osei-Afrivie v. Med. Coll. Of Pa., 937 F.2d 876, 882-83 (3d Cir. 1991) (holding that non-lawyer proceeding pro se could not represent his own children); 28 U.S.C. § 1654 (parties may proceed in federal court "personally or by counsel"). Accordingly, we will treat him as the sole Appellant in this appeal. See also Schneller v. Fox Subacute at Clara Burke, 317 F. App'x 135, 137 n.1 (3d Cir. 2008).

dismissing Appellant's complaint and denying his post-judgment motions and requested leave to appeal in forma pauperis. The District Court granted him leave to appeal in forma pauperis on October27, 2009, and Schneller filed a document entitled "Notice of Appeal" on November 10,2009.

Appellant seeks to appeal both the District Court's dismissal of his action and its denial of his post-judgment motions. The District Court's judgment dismissing the underlying action became final on August 6, 2009, when the District Court denied Appellant's timely-filed motion for reconsideration.[2] See 28 USC. §1291 (vesting jurisdiction in courts of appeals over "final decisions" of the district courts); Budinich V Becton Dickinson & Co., 486 U.S. 196, 199-200(1988) (holding that a final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the

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[2] Because the motion for reconsideration was filed within ten business days of the District Court's entry of judgment, the time to file a notice of appeal from the June26, 2009 dismissal was tolled until the District Court denied the motion for reconsideration on August 4,2009. See former Fed. R. Civ. P.59(e) (amendment effective Dec. 1,2009). Appellant's subsequent motions to supplement the record and for sanctions do not fall within the subset of post-judgment motions which toll the time for filing a notice of appeal. See Fed. R. App. P. 4(a)(4)(A).

judgment, and that a question remaining to be decided after entry of such a decision does not affect its finality). Because Schneller failed to file a notice of appeal within thirty days of entry of that order, we lack jurisdiction over the District Court's June 26, 2009 opinion and order dismissing his action and its August 6, 2009 order denying his motion for reconsideration. See Fed. R. App. P. 4(a)(1); Bowles v. Russell, 551 U.S. 205 213(2007) (holding that the timely filing of a notice of appeal is a jurisdictional requirement).

The District Court's denials of Appellant's post-judgment motions are separately appealable. See Pennsylvania v. Flaherty, 983 F.2d 1267, 1276 (3d Cir. 1993) ("Post-judgment orders are final for purposes of § 1291 and immediately appealable because the policy against piecemeal review is unlikely to be undermined."). The Court denied Schneller's motion to supplement the record by order entered September 4, 2009. Because he failed to file a notice of appeal within thirty days of that denial, we also lack jurisdiction over his appeal with respect to that order. See Fed. R. App. P. 4(a)(1); Bowles, 551 U.S. at 213. However, Schneller's motion for sanctions was not denied until September 9, 2009. On October 8, 2009, Schneller filed a document entitled "Plaintiffs' Motion for Leave to Appeal In Forma Pauperis"

which specified those orders he wished to appeal, the grounds he wished to appeal them on, and the court he wished to appeal them to. The District Court should have treated this document as a notice of appeal. Fed. R. App. P. 3(c)(1); Masquerade Novelty v. Unique Indus., 912 F.2d 663, 665 (3d Cir. 1 has, within the time provided to file an appeal, filed documents that 'specify the party or parties taking the appeal; . . . the judgment, order or part thereof appealed from, and . the court to which the appeal is taken'"). Because this document was timely-filed with respect to the District Court's denial of Appellant's motions for sanctions, we retain jurisdiction over his appeal from that order. See Fed. R. App. P. 4(a)(1); Flaherty, 983 F.2d at 1276.

In his motion for sanctions and costs, Schneller argued that pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927, Appellees should be sanctioned for filing frivolous and vexatious motions and pleadings for the purpose of causing unnecessary delay and increasing the cost of the litigation. While Schneller set forth the facts and legal arguments made by Appellees that he disagreed with, he did not provide any basis from which the District Court could have concluded that Appellees alleged those facts or made those arguments "for an improper purpose" or with the intent of "misleading the court." Schneller's motion

for sanctions was not the proper vehicle for challenging these assertions and arguments - appeal was. Because Schneller failed to timely appeal from the District Court's dismissal of his action and denial of his motion for reconsideration, we cannot consider these arguments at the present time.

Because Schneller's appeal presents no substantial question, we will summarily affirm the orders of the District Court denying the requested relief See 3d Cir. LAR 27.4; I.O.P. 10.6. Schneller's appeal from the District Court's dismissal of his action, denial of his motion for reconsideration, and denial of his motion to supplement the record is dismissed for lack of appellate jurisdiction. See Fed. R. App. P. 4(a)(1); Bowles 551 U.S. at 213.

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Submitted by the Clerk for Possible Dismissal for Lack of Jurisdiction
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February 25,2010

Before: SLOVITER, AMBRO and SMITH, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania for possible dismissal for lack of jurisdiction or summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on February 25, 2010. On consideration whereof; it is now hereby

ORDERED and ADJUDGED by this Court that the appeal is dismissed in part for lack of jurisdiction and the order of the District Court entered September 9, 2009, be and the same is hereby affirmed. All of the above in accordance

with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: 8 March 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JAMES D. SCHNELLER, et al., CIVIL ACTION

Plaintiffs

v. NO. 08-5704

PROSPECT PARK NURSING &
REHABILITATION CENTER, et al.,
Defendants

FILED JUN 26 2009

MEMORANDUM

STENGEL, J. June 25, 2009

More than six years after the death of his elderly mother on March 31, 2002, James D. Schneller and allegedly four other plaintiffs[1] filed a pro se action

[1] These plaintiffs include: (1) Heirs and beneficiaries of Marjorie C. Schneller, by James D. Schneller, trustee ad/item; (2) Estate of Marjorie Schneller, by and through James D. Schneller, trustee ad/item;

against several defendants[2] whom be claims are legally responsible. The genesis of the case appears to be medical and legal malpractice as a result of the allegedly negligent services rendered to Mr. Schneller's parents during the last few months of their lives. In fact, in the majority of paragraphs introducing the defendants, the plaintiff indicates that "this action is an action in professional liability and intentional tort against this defendant." See Compl. ¶¶

4,9-13. The only exceptions are in the paragraphs for his brother and sister. Id.¶¶ 5-7. The

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and (3) Marjorie Zitomer executrix of the Estate of Marjorie Schneller (Miss Zitomer is Mr. Schneller's sister and also a defendant in this action). In a related case the Third Circuit noted: "Schneller filed his complaint pro se. He also purports to represent other persons and entities. Although Schneller is entitled to represent himself pro se, he 'may not appear pro se in the cause of another person or entity.'" Schneller et al. v. Crozer Chester Medical Center, et al, 276 Fed. Appx. 169, *170 n.1 (3dCir. 2008). Accordingly. I will refer to Mr. Schneller as the sole plaintiff in this case.

[2] These defendants include; (1) Prospect Park Nursing and Rehabilitation Center; (2) "its owners and employees;" (3) Marjorie Zitomer (4) Richard Schneller (the plaintiffs brother); and (5) T. Sergeant Pepper, Esq.

defendants have filed motions to dismiss. For the following reasons, I will grant these motions and dismiss this case.

1. BACKGROUND

In February 2004, Mr. Schneller began an action against these defendants in the Court of Common Pleas of the County of Delaware. The case was dismissed through entries of judgment non pros for failure to file Certificates of Merit as required by Rule 1042.3 of the Pennsylvania Rules of Civil Procedure. Schneller et al. v. Prospect Park Nursing & Rehabilitation Center et al., 2006 Pa. Dist. & Cnty. Dec. LEXIS 392 (2006). Mr. Schneller unsuccessfully attempted to re-open the case and/or strike the judgment of non pros. Id. He then appealed to the Pennsylvania Superior Court which affirmed without an opinion the entries of judgment. Schneller et al. v. Prospect Park Nursing & Rehabilitation Center. et al., 945 A.2d 781 (Pa.Super. 2007). The Pennsylvania Supreme Court denied his petition for allowance of appeal. Schneller et al. v. Prospect Park Nursing & Rehabilitation Center. et al., 2008 Pa. LEXIS 2398 (Pa. 2008).

The sixty (60) page complaint contains three-hundred seventy-three (373) paragraphs

purporting to provide the basis of the plaintiffs thirty-two (32) claims:

Count I A - Violation of the Assisted Suicide Funding Restriction Act of 1997

Count 1 B - Civil Action for Deprivation of Rights

Count 1 C - Conspiracy to Interfere with Civil Rights - Depriving Persons of Rights and Privileges

Count 1 D Conspiracy to Interfere with Civil Rights - Obstructing Justice and Intimidating Parties - Battery

Count 1 E - Neglect to Prevent Deprivation of Rights and Conspiracy for Deprivation of Rights

Count 1 F - Failure to Warn

Count 2 - Breach of Contract

Count 3 - Breach of Contract

Count 4 - Fraudulent Inducement of Contracts

Count 5 - Breach of Confidential ~d Fiduciary Relationship

Count 6 - Wrongful Death

Count 7 - Survival

Count 8 - Intentional Tort - Abuse of Power of Attorney

Count 9 - Intentional Tort - Abuse of Advanced Health Directive

Count 10 - Negligence Per Se (violation of numerous state and federal statutes)

Count 11 - Slander and Libel

Count 12 - Breach of Confidentiality

Count 13 - Survival - Negligent and Intentional Infliction of Emotional Distress
Count 14 - Survival - Fraud
Count 15 - Survival - Conspiracy
Count 16 - Survival Action - Punitive Damages
Count 17 - Professional Negligence - Medical
Count Is - Professional Negligence - Attorney and Firm
Count 19 - Survival - Negligent and Intentional Infliction of Emotional Distress to George Schneller
Count 20 - Survival - Fraud and Intentional Misrepresentation to George H. Schneller
Count 21 - Survival Action - Conspiracy Damaging to George R. Schneller
Count 22 - Survival Action - Punitive Damages for the Estate of George H. Schneller
Count 23 - Intentional Infliction of Emotional Distress
Count 24 - Conspiracy
Count 25 - Punitive Damages
Count 26 - Tortious Interference with Prospective Economic Advantage
Count 27 - Breach of Fiduciary Duty

Mr. Schneller also alleges violations of various regulations entitled Requirements for Long

Term Care Facilities. See 42 C.F.R. § 483.10, et seq.[3] Compl. ¶ 18d.

II. STANDARD FOR A MOTION TO DISMISS

A motion to dismiss under Rule l 2(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted examines the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41,45-46(1957). The factual allegations must be sufficient to make the claim for relief more than just speculative. Bell Atlantic Corn. v. Twombly, 550 U.S. 544, 555 (2007). In determining whether to grant a motion to dismiss a federal court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences

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[3] These provisions "contain the requirements that an institution must meet in order to qualify to participate as a [skilled nursing facility] in the Medicare program, and as a nursing facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." 42 C.F.R § 483.l(b). These regulations do not confer a private right of action. Accordingly, they provide no basis for jurisdiction pursuant to 28 U.S.C. § 1331.

in favor of the plaintiff. Id . see also D.P. Enters v. Bucks County Cmty.Col1., 725 F.2d 943,944 (3d Cir. 1984).

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiffs claim and the grounds upon which it rests. Id. The "complaint must allege facts suggestive of [the proscribed] conduct." Twombly, 550 U.S. at 555. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion School Dist., 132 F.Sd 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pennsylvania Transy. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). The claim must contain enough factual matters to suggest the required elements of the claim or to "raise a reasonable expectation that discovery will reveal evidence of those elements. Phillips v. County of Allegheny, 515 F.2d 224,234 (3d Cir. 2008) (quoting Twombly, 550 U.S. at 555).

A case may be also dismissed under Rules 12 (b)(1) and 12 (h)(3) of the Federal Rules of Civil Procedure "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter...." Fed.R.Civ.P. 12(h)(3). Alternatively, a court choosing not to grant a motion to dismiss for lack of subject matter

jurisdiction may, under Rule 12(e), grant a motion for a more definitive statement if "a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. . . ." Fed.R.Civ.P. 12(e).

Moreover, courts must liberally construe pro se complaints and "apply the applicable law, irrespective of whether [the] litigant has mentioned it by name." Higgins v. Bever, 293 F.3d 683, 688 (3d Cir. 2002). Thus5 a plaintiffs complaint, however inartfully pleaded, must be held to a less stringent standard than a formal pleading drafted by an attorney. Estelle v. Gamble, 429 U.S. 97,106 (1976).

III. DISCUSSION

The defendants argue, inter alia5 that the case should be dismissed because this court does not have subject matter jurisdiction. Federal courts are courts of limited jurisdiction, and they may only decide cases as authorized by Congress or the Constitution. District courts have subject matter jurisdiction over federal questions pursuant to 28 U.S.C. § 1331, in which Congress grants courts "original jurisdiction of all civil actions arising

under the Constitution, laws, or treaties of the United States."

Federal courts also have subject matter jurisdiction over cases where there is complete diversity of citizenship among the parties and the amount in controversy "exceeds the sum or value of$75,000, exclusive of interest and costs" pursuant to 28 U.S.C. §1332(a).[4] The requirement of complete diversity means that 'jurisdiction is lacking if any plaintiff and any defendant are citizens of the same state." Menan Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 290 (3d Cir. 1998) (citing Strawbridge v. Curtiss, 7 U~S. (3 Cranch) 267,2 L. Ed. 435(1806)).

When a motion to dismiss for lack of subject matter jurisdiction is before a court, "the person asserting jurisdiction bears the burden of showing

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[4] Title 28 U.S.C. § 1332(a) provides: The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between: (1) citizens of different states; (2) citizens of a state and citizens or subjects of a foreign state; (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state as plaintiff and citizens of a state or of different states.

that the case is properly before the court at all stages of litigation." Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). This burden is applicable to cases based on diversity jurisdiction as well, and in such cases a plaintiff must demonstrate complete diversity between the parties and that the amount in controversy requirement has been met. Quaker State Dyeing & Finishing Co., Inc., v. ITT Telephone Com., 461 F.2d 1140, 1143 (3d Cir. 1972) (citing McSparran v. Weist, 402 F.2d 867, 875 (3d Cir. 1968)).

Here, the plaintiff and Defendant Prospect Park are residents of Pennsylvania. There is clearly no diversity of citizenship. Thus, jurisdiction cannot be based on 28 U.S.C. § 1332. The defendants, however, also argue that the complaint fails to present a federal question sufficient to confer jurisdiction. Federal question jurisdiction exists in one of two circumstances: (1) where federal law creates the cause of action; or (2) where the complaint poses a substantial federal question. Sodi v. Discover Financial Services, 2004 U.S. Dist. LEXIS 24133, *8 (E.D. Pa. 2004). Here, the plaintiff's alleged bases for federal question jurisdiction fall into two categories: (1) alleged violations of federal statutes and regulations; and (2) alleged civil rights violations.

Mr. Schneller cites several federal statutes and regulations throughout his complaint. Of the thirty-two counts contained in the complaint,

however, only five counts attempt to set forth federal causes of action. The first count alleges a violation of the Assisted Suicide Funding Restriction Act of 1997, 42 U.S.C. § 14401, et seq. See Compl. ¶¶ 88-99. The defendants argue that this Act does not create a private right of action, and thus cannot provide the basis for jurisdiction. I agree.

If Congress intends to create a private cause of action under a federal statute, then federal courts should find a private cause of action under the given statute. Transamerica Mortgage Advisors. Inc. v. Lewis, 444 U.S. 11,15(1979). Congress' intent is determined by examining "the language or structure of a statute or the circumstances of its enactment." Id. "[W]hether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." Id. If the language of the statute expressly gives a remedy then courts should be wary when they are requested to add an additional remedy that is not expressly provided for in the statute. Id.

The structure and language of this Act do not show any intent by Congress to establish a private cause of action. The purpose of the Act is "to continue current federal policy by providing explicitly that federal funds may not be used to pay for items and services (including assistance) the purpose of which is to cause (or assist in causing) the suicide, euthanasia, or mercy killing of any individual." 42

U.S.C. § 14401(1,). Mr. Schneller claims that jurisdiction is proper under this Act because Defendant Prospect Park applied funds appropriated by Congress including federal funds under certain grant programs, and federal advocacy grants, to pay for and provide for services which directly contributed to the assisting and causing of the death of Marjorie C. Schneller, by unlawful means including euthanasia, mercy killing and assisted suicide. See Compl. ¶ 93. Mr. Schneller's assertion is contrary to law.

The rationale for the enactment of this statute is to prevent federal funds from being used for the criminal and unlawful purpose of assisted suicide. See 42 U.S.C.A. §14401 (a)(2). There have never been any criminal charges in connection with the care and treatment of Marjorie Schneller, and the claims that the defendants engaged in some type of mercy killing are unfounded. Further, no court has found that Title 42 U.S.C. §14401, et seq., creates a private cause of action. Thus, because the Assisted Suicide Funding Restriction Act cannot form the basis of subject matter jurisdiction, I will dismiss Count lA.

The next four counts in the complaint allege the deprivation of civil rights pursuant to 42 U.S.C. §§ 1983, 1985, and 1986. Because they contemplate a private cause of action, these statutes provide subject matter jurisdiction to the court. Counts in

1C, 1D, and 1E set forth the plaintiffs civil rights claims against the defendants for alleged violations of his mother's rights guaranteed by the Fourteenth Amendment to the United States Constitution. Count 1B contains allegations that the defendants deprived Mrs. Schneller of life, liberty, and property by enforcing her advanced health care directive over Mr. Schneller's objection and causing her death. See Compl. ¶¶ 105-119. Count 1C claims that the defendants conspired to deprive Mrs. Schneller of rights and privileges including "her basic rights to eat, drink, and breathe," and her "rights to life, privacy, security, freedom of speech, freedom to write and communicate, right to locomotion, family interaction, rights to legal representation, to meaningful family visits, arid right to choose her daily regimen and health program." See Compl. ¶¶ 121-146. Count 1D alleges that the defendants "in their conspiracy to prevent by force, intimidation, and threat, intended to deprive classes of persons of the equal protection of the laws, or of equal privileges and immunities under the law," and that these acts constituted causes of action for intimidation, obstruction of justice, criminal assault, and criminal maiming. See Compl. ¶¶ 147-163. Finally, Count IE alleges that the defendants, "having knowledge that any and all of the wrongs conspired to be done, as enumerated in this complaint, were about to be committed, and having power to prevent or aid in preventing the

commission of the same, neglected or refused so to do." See Compl. ¶¶ 164-171.

The Fourteenth Amendment to the U.S. Constitution provides that "no State shall.. deprive any person of life, liberty, or property, without due process of law..." U.S. Const., Amend. 14, § 1 - The protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights, no matter how unfair that conduct may be. National Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179(1988). It is the duty of this court to ensure that the Fourteenth Amendment is invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. Brentwood Acad. v. Tennessee Secondanry Sch. Athletic Ass'n, 531 U.S. 88, 296 (2001), Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991); Blum v. Yaretsky, 457 U.S. 991(1982). If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'Under color of state law" for Section 1983 purposes. Brentwood Acad., 531 U.S. at 295 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922(1982)).

Title 42 U.S.C. §1983 authorizes redress for violations of constitutional rights and provides, in pertinent part, that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by . the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983.

By its terms, Section 1983 does not create a substantive right; it merely provides a method for vindicating federal rights conferred by the United States Constitution and the federal statutes that it describes. Baker v McCollan, 43 U.S. 137 (1979). In order to establish a claim under Section 1983, a plaintiff must demonstrate (1) a violation of a right secured by the Constitution and the laws of the United States and that (2) the alleged deprivation was committed by a person acting under color of state law. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

Here, Mr. Schneller fails to satisfy these requirements. Although a private party may cause a deprivation of a constitutional right, it is subjected to liability under Section 1983 only when

it does so under color of law. Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156(1978). Section 1983 excludes from its reach "merely private conduct," no matter how discriminatory or wrongful. American Mfs. Mut. Ins. Co., 526 U.S. at 50. The actions alleged here were not performed under color of state law, and the defendants are not and cannot be considered state actors.

The complaint alleges, however, that the defendants "have applied funds appropriated by Congress for the purpose of paying for the provision of health care services, federal finds under certain grant programs including Medicare and Medicaid, and federal advocacy grants, to pay for, provide, and contribute to payment or coverage, for health care items and service furnished." See Compl. ¶ 16. These allegations do not establish that the defendants were acting "under color of law" or were state actors. The traditional exclusive governmental function test requires that a private entity exercise powers traditionally and exclusively reserved to the State, such as holding an election or eminent domain. Wolotsky v. Huhn, 960 F.2d 1331,1335 (6th Cir 1992). The provision of hospital services is not a traditional public function exclusively reserved for the State. Shannon v. Shannon, 965 F.2d 542, 547 (7th Cir. 1992) ("hospital care is not an exclusive prerogative of the State).

When analyzing the exclusive government function test, the Supreme Court has held that the receipt of public finds and the performance of a function serving the public, alone, are not enough to make a private entity a state actor. Rendell-Baker v. Kohn, 457 U.S. 830, 840(1982); Black et al. v. Indiana School District, 985 F.2d 707,710-11 (3d Cir. 1993) (a school bus driver is not performing an exclusive government function, even though paid by the state and performing a service for the public). The fact that hospitals and nursing homes may be extensively regulated and may receive financial support from the government through Medicaid and Medicare does not make them state actors. Blum 457 U.S. at 1011. In Blum, the Supreme Court flatly rejected the argument that the State's payment of more than 90% of nursing home patients' medical expenses and the licensing of nursing homes does not create a symbiotic relationship between the state and nursing homes. Additionally, the vast majority of Courts of Appeals have determined that the recipient of federal construction funding, Medicare and Medicaid funds, and the existence of tax exemption, as well as state licensing requirements for non-profit hospitals, do not constitute state action under 42 U.S.C. § 1983. See Hodge v. Paoli Memorial Hospital, 576 F.2d 563 (3d Cir. 1978) (citing Schlein v. Milford Hospital. Inc. 561 F.2d

427 (2d Cir. 1977); Greco v. Orange Memorial Hospital Corporation, 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 1000(1975); Jackson v. Norton-Children's Hospitals. Inc., 487 F.2d 502(6th Cir. 1973), cert. denied, 416 U.S. 1000(1974); Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976); Watkins v. Mercy Medical Center, 520 F.2d 894(9th Cir. 1975); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973)).

Accordingly, the receipt of federal funding is not determinative of state action. Private entities are not transformed into state actors by the simple provision of funds. Because Mr. Schneller cannot establish state action, he cannot establish a cause of action under 42 U.S.C. § 1983 or related statutes, which provide a necessary conduit through which the plaintiff might recover for alleged federal rights violations perpetrated against him. Accordingly, 1 will dismiss the non-Commonwealth defendants from Counts lB, IC, ID, and IE.

If these federal claims were properly before me, they would still fail as untimely. Although Rule 12(b) does not explicitly permit the assertion of a statute of limitations defense by a motion to dismiss, the so-called "Third Circuit Rule" allows a

defendant to assert a limitations defense in a Rule 12 (b)(6) motion "if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'" Zankel v. Temple University, 245 Fed. Appx. 196, 198 (3d Cm 2007) (citing Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002)). Because these federal statutes do not set forth a specific statute of limitations, the claims are subject to Pennsylvania's two-year statute of limitations. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 124 (2005) (where a plaintiff relies upon federal statutes in asserting a claim, and those statutes do not contain a specific provision regarding the time within which an action may be brought, federal courts apply the statute of limitations governing suits for personal injury in which the action arises); Wilson v. Garcia, 471 U.S. 265, 275 (1985); see also Lake v. Arnold, 232 F.3d 360,368 (3d Cir. 2000) (actions arising under Sections 1983 and 1985 are subject to the statute of limitations prescribed for personal-injury actions in the state in which the relevant events occurred). Pennsylvania's personal injury statute of limitations is two years. Vojtasek v. Diocese of Allentown, 916 A.2d 637, 640 (Pa. Super. 2006); 42 Pa.C.S.A. § 5524(2). The death of Marjorie Schneller is a discreet and identifiable event, and the statute of limitations on any claims arising from her death or any of the alleged events that precipitated her death, began to arise on March 31, 2002. This action was commenced on December 5

2008, more than six (6) years later, and is thus untimely by over four (4) years. Accordingly, Mr. Schneller's federal claims would be time-barred if they were properly before me.

Mr. Schneller claims that the court has supplemental jurisdiction over his remaining state law claims pursuant to 28 U.S.C. § 1367(a), which provides:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in like action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The state law claims in this amended complaint substantially predominate over the federal claims. See 28 U.S.C. § 1367(c)(2). The federal claims in the amended complaint will be dismissed. 28 U.S.C. § 1367(c)(3). Accordingly, I decline to exercise supplemental jurisdiction over the state law claims in this case.

I note, however, that if the state law claims were properly before me, they would still be

dismissed as untimely. The plaintiff and eleven of the thirteen defendants are residents of Pennsylvania, and all relevant events in this case arose in Pennsylvania. It is well established that a federal court shall apply Pennsylvania substantive law and federal procedural rules to the resolution of state law claims. See Erie Railroad Comnany v. Tomkins, 304 U.S. 64 (1938)). Accordingly, Pennsylvania law governs the disposition of the plaintiffs state law claims. In Pennsylvania, the applicable two-year statute of limitations for tort claims provides that: The following actions and proceedings must be commenced within two years:

(1)An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
(2)An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
(3)An action for taking, detaining or injuring personal property, including actions for specific recovery thereof . . .
(7)Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another

limitation specified in this subchapter.

Title 42 Pa. C.S.A. § 5524. Thus, under § 5524(2), because the case was filed over four years after Mrs. Schneller's death, the plaintiffs state law tort claims arising from her death or the care she received in the months preceding her death would also be time--barred.

Likewise, all contract claims in this amended complaint would also be untimely because under Pennsylvania law, an action for breach of contract is subject to a four-year statute of limitations. 42 Pa.C.S.A. § 5525. Mrs. Schneller died on March 31,2002, and the case was filed over four years later. Thus, the plaintiffs state law contract claims arising from the death of his mother or the care she received would also be time-barred.

In conclusion, while the plaintiff attempts to bring federal claims in combination with his predominant state law claims, the federal claims will be dismissed for the reasons set forth in this memorandum. Finally, I decline to exercise supplemental jurisdiction over the state law claims, all of which are untimely.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNA.

JAMES D. SCHNELLER, et al., CIVIL ACTION
Plaintiffs

v. NO. 08-5704

PROSPECT PARK NURSING &
REHABILITATION CENTER, et al.,
Defendants

FILED JUN 26 2009

ORDER

AND NOW, this 25 th day of June, 2009, upon consideration of the defendants' motions to dismiss (Documents #4, 6, 15), and the plaintiff's response thereto (Documents #9, 16, 17), it is hereby ORDERED that the motions to dismiss are GRANTED in their entirety.

IT IS FURTHER ORDERED that all remaining motions in this case are DENIED as moot. The Clerk of Court is directed to mark this action CLOSED for all purposes

BY THE COURT:

_____/s/_____

LAWRENCE F. STENGEL

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No.09-4372

JAMES D. SCHNELLER, HEIRS AND BENEFICIARIES OF MARJORIE C. SCHNELLER, BY JAMES D. SCHNELLER, TRUSTEE AD LITEM ESTATE OF MARJORIE SCHNELLER, BY AND THROUGH JAMES D. SCHNELLER, TRUSTEE AD LITEM, MARJORIE ZITOMER, EXECUTRIX OF THE ESTATE OF MARJORIE SCHNELLER, ESTATE OF GEORGE H. SCHNELLER, BY AND THROUGH PERSONAL REPRESENTATIVE JAMES D. SCHNELLER

v.

PROSPECT PARK NURSING AND REHABILITATION CENTER, ITS OWNERS AND EMPLOYEES; MARJORIE ZITOMER; RICHARD SCHNELLER; T. SERGEANT PEPPER, ESQUIRE

James D. Schneller, Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 08-cv-05704)
District Judge: Honorable Lawrence F. Stengel

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and GREENAWAY, Circuit Judges

SUR PETITION FOR EN BANC REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges ofthe circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L Ambro, Circuit Judge

Dated: 12 April 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JAMES D. SCHNELLER, et al., CIVIL ACTION

Plaintiffs

v. NO. 08-5704

PROSPECT PARK NURSING &
REHABILITATION CENTER, et al.,
Defendants

FILED AUG 06 2009

ORDER

STENGEL, J.

AND NOW, this 5th day of August 2009, upon consideration of the plaintiffs motion for reconsideration (Document #23), and the defendants' response thereto (Documents #24), it is hereby ORDERED that the motion is DENIED.[1]

BY THE COURT.

_____/s/_____

LAWRENCE F. STENGEL.

1- On June26, 2009, I dismissed the above-captioned case. (Documents #21 and #22). The plaintiff filed a motion for reconsideration to which the defendants responded. Granting a motion for reconsideration is appropriate "if the party seeking reconsideration shows at least one of the following grounds; (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . or (3) the need to correct a clear error of law or factor to prevent manifest injustice." Max's Seafood Cafe' ex rel. Lou-Ann. Inc. *v.* Quinteres, 176 F.3d 669, 677 (3d Cir. 1999) citing N. River Ins Co v. CIGNA Reins. Co., 52 F.3d 1194, 1218 (3d Cr. 1995), see also Cont'l Cas. Co. v. Diversified Indus. Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995) (because federal courts have a strong interest in the finality of judgrnents, motions for reconsideration should be granted sparingly). The plaintiff has shown none of those grounds. There

was no intervening change in the controlling law, no new evidence presented, or no clear error of law or fact in my previous Memorandum and Order dismissing the actions. Accordingly, I will deny the motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JAMES D. SCHNELLER, et al., CIVIL ACTION

Plaintiffs

v. NO. 08-5704

PROSPECT PARK NURSING &
REHABILITATION CENTER, et al.,
Defendants

FILED SEP 4 2009

ORDER

STENGEL, J.

AND NOW, this 3d day of September, 2009, upon consideration of the plaintiffs motion to supplement the record (Document #26), it is hereby ORDERED that the motion is DENIED.

BY THE COURT.

_____/s/_____

LAWRENCE F. STENGEL

1 On June 26, 2009, I granted the defendants' motions to dismiss this case in its entirety. See Documents #21 and 22. On August 6, 2009, I denied the plaintiff's motion for reconsideration of that dismissal. See Document #25. The case is terminated and further supplementation of the record is unnecessary. Accordingly, I will deny this motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JAMES D. SCHNELLER, et al., CIVIL ACTION

Plaintiffs

v. NO. 08-5704

PROSPECT PARK NURSING &
REHABILITATION CENTER, et al.,
Defendants

FILED SEP 09 2009

ORDER

STENGEL, J.

AND NOW, this 3d day of September, 2009, upon consideration of the plaintiffs "motion for sanction and for costs to defendants for vexatious, frivolous, unsupported, and dilatory litigation" (Document #27), it is hereby ORDERED that the motion is DENIED.

BY THE COURT.

_____/s/_____

LAWRENCE F. STENGEL.